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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-1123

W. D. DUNNING, JOHNNIE KYSER, AZALEA
CITY BRANCH NO. 496, NATIONAL
ASSOCIATION OF LETTER CARRIERS, a
corporation or association, and NATIONAL
ASSOCIATION OF LETTER CARRIERS, a
corporation or association,

Petitioners,

v.

EARL BOYES,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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TABLE OF CONTENTS

OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR DENYING WRIT	4
CONCLUSION	7

TABLE OF AUTHORITIES

<i>Bird v. Meadow Gold Products, Inc.</i> , 60 Misc. 2d 212, 302 N.Y.S. 2d 701 (1969)	4
<i>Linn v. United Plant Guard Workers</i> , 383 U.S. (1966)	4-5-6
<i>General Motors Corp. v. Mendicki</i> , 367 F. 2d 66 (10th Cir. 1966)	4

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**I.
OPINION BELOW**

Respondent is satisfied with Petitioners' statements.

**II.
JURISDICTION**

Respondent is satisfied with Petitioners' statements that the judgment of the Supreme Court of Alabama was entered on September 30, 1977; that a timely petition for rehearing was denied on November 18, 1977; and that the jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

**III.
QUESTION PRESENTED**

The question presented to this Honorable Court is whether grounds exist in the current action to warrant the granting of a Writ of Certiorari to the Supreme Court of Alabama.

**IV.
CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Other than as possible groundwork for Petitioners' arguments on the merits, the provisions cited in the Petition for Certiorari do not bear substantially on the question now before this Honorable Court.

Respondent contends that Amendment X to the Constitution of the United States is relevant here. That Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

**V.
STATEMENT**

Respondent Earl Boyes brought this claim for libel in the Circuit Court for the Twelfth Judicial District in Mobile County.

On April 22, 1976, the Superintendent Cottage Hill Station of the U. S. Postal Service, George Naman, denied a step wage increase to the Petitioner, Johnnie Kyser, on the ground of "substandard performance". Pursuant to Article XV, Section 2 of the current National Agreement between the United States Postal Service and the National Association of Letter Carriers, (Appendix to Petition for Writ of Certiorari, p. 12a) Mr. Kyser undertook Step 1 of the grievance procedure provided for in the agreement by discussing the denial of his step wage increase with his immediate supervisor, Earl Boyes, Assistant Superintendent Cottage Hill Station (204-B). On May 7, 1976, Mr. Boyes, in his capacity as Assistant Superintendent Cottage Hill Station (204-B), issued a decision denying Mr. Kyser's grievance.

On May 9, 1976, a letter identified as "an appeal to step 2a of a grievance decision" was sent to Postmaster, Mobile, Alabama, by W. D. Dunning, Shop Steward, National Association of Letter Carriers and Johnnie Kyser, who signed the letter as the Aggrieved. (Appendix to Petition for Writ of Certiorari, pp. 8a9a) This letter is on official stationery of Azalea City Branch No. 469, National Association of Letter Carriers and sets out Mr. Kyser's grievance. It states that the investigation into Mr. Kyser's record does not indicate "a serious unsatisfactory service", but rather it displays that he has done a good job. The letter goes on to state that the denial of Mr. Kyser's step wage increase "does smack of Racial Overtones" and implies that the denial was due to the fact that Mr. Kyser is black. Rather than stopping at this point, the letter gratuitously adds that Earl Boyes is a "known bigot" and the root of Mr. Kyser's problems.

Petitioners moved to dismiss the complaint on the ground that the court lacked jurisdiction over the subject matter of the complaint because the Constitution of the United States pre-empts state court jurisdiction over "alleged common law defamation". The Circuit Court, Hocklander, J., denied defendants' motion. The Supreme Court of Alabama granted Petitioners' petition to appeal from the trial court's refusal to dismiss the action. (Appendix to Petition for Certiorari, p. 1a). The Supreme Court of Alabama affirmed (Appendix to Petition for Certiorari, p. 3a), and on November 18, 1977, Petitioners' motion for rehearing was overruled (Appendix to Petition for Certiorari, p. 10a).

V.
REASON FOR DENYING WRIT

This petition arises from the trial court's denial of Petitioners' motion to dismiss this action. Briefly, Petitioners contend that the communication on which this action is based was absolutely privileged because it was made in the course of a labor dispute and therefore that it will not support this action. Respondent, on the other hand, contends that the communication involved was qualifiedly privileged and therefore that a jury question is presented as to whether the communication was an abuse of that qualified privilege.

Petitioners urge that the Supreme Court of Alabama, in affirming the trial court's refusal to dismiss this action, improperly interpreted this Court's holding in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966), and in so doing, has reached a decision which is in conflict with *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966). However, Respondent urges that the decision of the Supreme Court of Alabama is a proper interpretation of *Linn* and is in accord with the decisions of this Honorable Court.

In this matter the Supreme Court held in part as follows:

"... defamatory communications made in the course of, and relevant to, a federal grievance proceeding are not *absolutely* privileged. Therefore, we refuse to follow the rule of absolute privilege suggested in *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966). We follow instead what we consider is a better rule, that of a *qualified* privilege, as set out in *Bird v. Meadow Gold Products, Inc.*, 60 Misc. 2d 212, 302 N.Y.S. 2d 701 (1969). We believe that the rule we announce follows what the Supreme Court of the United States has established as a general rule that a party to a labor dispute may recover for defamatory statements made during the course of the dispute if he can establish that the statement was made maliciously, with knowledge that it was false or with reckless disregard for whether it was false or not. *Linn v. United Plant Guard Workers of America*, 383

U.S. 53 (1966)." (See page 5 a of Appendix to Petition for Certiorari).

The *Linn* case, *supra*, which the Supreme Court of Alabama stated it was following, involved a suit for libel by an officer of an employer against the union based on defamatory statements made by the union in the course of a labor dispute. The District Court dismissed the case on the grounds that the National Labor Relations Board has exclusive jurisdiction over the subject matter. The Court of Appeals for the Sixth Circuit affirmed.

This Court reversed that dismissal and stated

"We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." *Linn*, *supra*, 383 U.S. at 55 (1966).

Obviously, if communication is absolutely privileged, it is not actionable under any circumstances. Therefore the above quoted language certainly indicates that this Court was speaking of a qualified privilege.

In that same case, in speaking of the jurisdiction of the National Labor Relations Board, this Court said

"In sum, although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party a license to injure the other intentionally by circulating defamatory or insulting material known to be false . . . In such case, the one issuing such material forfeits his protection under the Act . . ." *Linn*, *supra*, 383 U.S. at 61 (1966)

Again the protection afforded by an absolute privilege is not forfeited under any circumstances, so the above discussion indicates that the Court was speaking of a qualified privilege.

Further, in the same case this Court acknowledged that §8

(c) of the National Labor Relations Act manifests an intent to encourage free debate on issues, but said

" . . . the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. *But it must be emphasized that malicious libel enjoys no constitutional protection in any context.*" (Emphasis supplied) *Linn, supra*, 383 U.S. at 63 (1966).

If communication is not protected under all circumstances, it is subject only to a qualified privilege, not an absolute privilege.

All of the observations made by this Court in *Linn, supra*, point to one conclusion: though a free exchange of viewpoints is necessary in the resolution of labor disputes, the participants in labor disputes do not enjoy an absolute privilege in everything they say and write in connection with such labor disputes. There have to be outer limits across which the protections afforded those involved in labor disputes do not extend. This is what the Court said in *Linn, supra*, and what the Supreme Court of Alabama said in the present case.

It must be remembered that the present case has not proceeded past the Petitioners' motion to dismiss. There has been no finding that the communication involved was not privileged. In fact, there has been no opportunity for Respondent to offer proof in support of his complaint. Whether Respondent can show that the communication was not privileged remains to be seen. But according to the observations and holding of this Court in *Linn, supra*, and the Supreme Court of Alabama in the present case, the privilege involved is qualified; and, therefore, Respondent should have the opportunity to present his proof to a jury.

VI. CONCLUSION

There being no conflict between the holding of the Supreme Court of Alabama in this case and the holdings of this Court of the question involved, no issue is presented to this Honorable Court for review of certiorari, and Respondent respectfully submits that the Petition of Certiorari is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief in Opposition to Petition for a Writ of Certiorari have been served on Mozart G. Ratner, 1900 M. Street, N.W., Washington, D.C. and Otto E. Simon, Van Antwerp Building, Mobile, Alabama, Attorneys for Petitioners by mailing copies of same to them by first class mail, postage prepaid on the twenty-fifth of April, 1978.

BERT S. NETTLES